Supreme Court, U.S.
FILED
JAN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-941

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITIBANK, N.A.,
Petitioner,

vs.

DATA LEASE FINANCIAL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*ROBERT M. SONDAK, of
PAUL, LANDY, BEILEY & HARPER, P.A.
Penthouse, Peninsula Federal Bldg.
200 Southeast First Street
Miami, Florida 33131
(305) 358-9300

and

*LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455

Attorneys for Respondent
Data Lease Financial Corporation

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

PREFACE 1
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 2
ARGUMENT—

I. The Eleventh Circuit's Decision Does Not Conflict With the National Bank Act 4
II. The Eleventh Circuit's Opinion Does Not Conflict With a Decision of the Fifth Circuit 6

CONCLUSION 8

TABLE OF AUTHORITIES

Case

Empire Life Insurance Company of America v. Valdak Corporation, 468 F.2d 330 (5th Cir. 1972) 3, 6, 7

Statute

12 U.S.C.A. § 71 (West Supp. 1987) 4

Text

Restatement (Second) of Agency § 1 (1958) 5

Other

Section 9-207 of the U.C.C. 7

No. 87-941

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITIBANK, N.A.,
Petitioner,

vs.

DATA LEASE FINANCIAL CORPORATION, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFACE

The parties will be referred to by their proper names. The following symbol will be used:

A—Petitioner Citibank's Appendix.

STATEMENT OF THE CASE

Citibank's statement of the case is incomplete. The facts, which must be reviewed in a light most favorable to Data Lease since this was an appeal from a summary judgment, are accurately set forth in the opinion of the Eleventh Circuit.

Citibank held, as collateral for a loan to Data Lease, 80% of the capital stock of Miami National Bank. When the loan went into default, Citibank represented to Data Lease that if Data Lease would relinquish control to Citibank, Citibank would assist Miami National in obtaining deposits and loans, and would furnish banking experts to improve the bank's performance. Data Lease relinquished control to Citibank, and Citibank installed new directors and management, making Joseph Stefan chairman of the board and president (A 21). Stefan, who later was convicted of criminal misconduct as a result of his management of Miami National, testified that Citibank put him there and that, while running Miami National, he really was working for Citibank (A 15, 30, n.17).

Miami National lost millions on "a disastrous series of loans." Citibank had refused "out of hand" to make those loans, but recommended Miami National make them. The Citibank officer who turned these loans down told Data Lease it had no reason to be concerned about the fact that Miami National made the loans. One of the Miami National directors who had been installed by Citibank misrepresented to Data Lease that the loans had been approved by the comptroller of currency and that Miami National's liability was minimal (A 22).

As a result of the dramatic decline in value of Miami National stock, Data Lease brought these claims against Citibank and the Citibank-controlled directors of Miami National.

SUMMARY OF ARGUMENT

The Eleventh Circuit reversed a summary judgment entered in favor of Citibank and the Miami National

directors because there was evidence from which a jury could find that Citibank controlled the directors of Miami National and could therefore be liable for the directors' mismanagement of Miami National. Citibank argues it cannot be liable because under the National Bank Act the directors are solely responsible for running a national bank. There is nothing in the National Bank Act which makes the directors solely responsible. Even if there was, the fact that Citibank and the directors of Miami National may have been violating the National Bank Act would not absolve Citibank of liability for the misconduct of its agents.

Citibank, in attempting to show conflict, misconstrues the holding of *Empire Life Insurance Company of America v. Valdak Corporation,* 468 F.2d 330 (5th Cir. 1972). Citibank says *Empire* requires intentional depreciation of the stock of Miami National in order to make the directors amenable to suit by Data Lease. This argument fails for two reasons. First, as Citibank recognizes in footnote 2 on page 3, Data Lease alleged fraud and conversion, as well as negligence, against the directors of Miami National. In addition there were RICO claims. The Eleventh Circuit, in reversing the summary judgment, reinstated all of these claims which allege intentional misconduct. Nor does Citibank's argument that *Empire* requires intentional misconduct have merit. The issue in that case was whether an individual shareholder could sue the directors or whether recovery could only be sought by a derivative suit. In *Empire* the misconduct happened to be fraud and that is why the Fifth Circuit characterized it as intentional. The opinion did not limit the right to recover to intentional misconduct.

ARGUMENT

I. The Eleventh Circuit's Decision Does Not Conflict With the National Bank Act.

The National Bank Act is not even mentioned in the opinion of the Eleventh Circuit, and it only merited a footnote in Citibank's 15-page motion for rehearing in the Eleventh Circuit (A 93). Nor is there anything in the National Bank Act which would prohibit Citibank from being held responsible for the negligence or intentional misconduct of the directors of Miami National, who were installed by Citibank and acting as its agents. Citibank's illogical argument is that it would be improper for the directors of Miami National to be under the control of Citibank, and therefore Citibank cannot be liable for their misconduct, even if it did in fact control them.

The Eleventh Circuit did not hold that the directors of a national bank are not responsible for the management of the bank. The Eleventh Circuit merely held that since there was evidence that the directors of Miami National were not independent, and were being controlled by Citibank, there were issues of fact which precluded a summary judgment for Citibank.

Citibank says at the top of page 10 that the National Bank Act makes it clear that the directors of Miami National were "solely responsible for the bank's management." Citibank misrepresents, by omitting a few words, and inserting a word of its own, the provision of the National Bank Act on which it relies. 12 U.S.C.A. § 71 (West Supp. 1987), says:

> The affairs of each association shall be managed by not less than five directors who shall be elected

> by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day of each year as is specified therefor in the bylaws. The directors shall hold office for one year and until their successors are elected and have qualified.

There is nothing in the National Bank Act which limits the liability for mismanagement to the directors.

Nor does the Florida law on agency conflict with the National Bank Act. It is clear from the opinion of the Eleventh Circuit that the agency law it relied on is nothing more than basic principles found in the Restatement (Second) of Agency § 1 (1958) to the effect that an agency relationship results where there is an agreement that one person shall act under the control of and on behalf of another.

Citibank argues on page 10 it had no right to supervise or control the directors of Miami National. Citibank did control them, however, regardless of whether it had the legal right to do so. The Eleventh Circuit quoted the testimony of the chairman and president of Miami National, Joseph Stefan, who testified that "at the bottom of everything" he was working for Citibank when he was running Miami National (A 15).

The portion of the opinion of the Eleventh Circuit involving the liability of Citibank for the conduct of the directors of Miami National is based on simple principles of agency. Citibank's argument that it could not be liable for controlling the directors of Miami National, because

this would be illegal, is without merit. There is no conflict with the National Bank Act.

II. The Eleventh Circuit's Opinion Does Not Conflict With a Decision of the Fifth Circuit.

Citibank argues that in the present case the Eleventh Circuit created conflict with *Empire Life Insurance Company of America v. Valdak Corporation,* 468 F.2d 330 (5th Cir. 1972), because in the present case the Eleventh Circuit held that there need not be intentional misconduct to depreciate the value of the stock in order for the pledgee to be liable.

Even if *Empire* required intentional misconduct, which it does not, there was intentional misconduct alleged in the present case. Citibank recognizes in footnote 2 on page 3 that Data Lease alleged fraud and conversion against the directors. There were also RICO claims. This is all clear from the opinion of the Eleventh Circuit. There is no relevant distinction between the misconduct alleged in the present case and that in *Empire.*

Nor did *Empire* hold that the pledgee of stock may not be held liable unless there is a specific intent to depreciate the value of the collateral. In *Empire* the Fifth Circuit stated on page 335:

> Defendant here alleges that plaintiff's acts not only violated its fiduciary duty to National but further violated its duty as pledgee not to deplete the value of the collateral intentionally. As a general proposition, the law implies a duty in the pledgee of stock to preserve the value of any collateral held by him to secure a loan. . . .

In *Empire* the conduct which caused the value of the stock to be lowered happened to be fraud and that is why the court used the word intentional. The issue in *Empire,* and in this case however, was whether the pledgor could proceed directly against the pledgee, instead of having to bring a derivative suit. In the present case the Eleventh Circuit stated:

> The issue in *Empire Life* was whether the pledgor could proceed directly against the pledgee. The issue in the present case is whether a pledgor can proceed directly against third parties whom the pledgee has installed on a corporation's board of directors. Nevertheless, we think that whenever a pledgee of stock installs its agents on the board of directors, these agents owe the pledgor the same direct duty as the pledgee. . . . (A 19).

The facts on which the cause of action was based in *Empire* occurred before Texas adopted the U.C.C. and the Fifth Circuit noted on page 334 that greater misconduct was required for recovery against the pledgee prior to the adoption of the U.C.C., than was required after it became law. Section 9-207 of the U.C.C., which is applicable in the present case, imposes on Citibank a duty of reasonableness.

It is thus clear that intentional misconduct is not required for recovery against the pledgee, but even if it was required, there was ample evidence of it in this record. *Empire* is on all fours with the present case, and the Eleventh Circuit properly construed and applied *Empire* to these facts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

*ROBERT M. SONDAK, of
PAUL, LANDY, BEILEY & HARPER, P.A.
Penthouse, Peninsula Federal Bldg.
200 Southeast First Street
Miami, Florida 33131
(305) 358-9300

and

*LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455

Attorneys for Respondent
Data Lease Financial Corporation

---

*Counsel of Record